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In The
Supreme Court of the United States

October Term, 1995

VARTITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

*Respondents.*On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit**RESPONDENTS' MOTION FOR LEAVE TO
FILE A SUPPLEMENTAL BRIEF**

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VARITY CORPORATION,

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**On Writ Of Certiorari To The United States
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**RESPONDENTS' MOTION FOR LEAVE TO
FILE A SUPPLEMENTAL BRIEF**

Respondents move for leave to file a supplemental brief, and in support of their motion state the following:

1. After respondents' brief was completed and filed on July 26, 1995, respondents' counsel discovered another significant argument supporting their position on the first of the two questions presented in this certiorari proceeding.
2. The argument which respondents seek to bring to the Court's attention by way of a supplemental brief is

based on § 502(l) of ERISA, 29 U.S.C. § 1132(l) (Supp. 1993). Respondents acknowledge that this argument does not involve "late authorities, newly enacted legislation, or other intervening matter that was not available in time to have been included" in respondents' original brief. See Supreme Court Rule 25.5. The amendment to ERISA by which § 502(l) was enacted became effective in 1989. Respondents nevertheless submit that the Court's consideration of this argument is essential to a full and fair exposition of the questions presented, and that in the interest of justice, leave should be granted to file a supplemental brief.

3. The proposed supplemental brief is appended to this motion. It consists of four pages. In conjunction with the 44 pages of respondents' original brief, respondents' briefs would not exceed the page limit established by Supreme Court Rule 33.

For the foregoing reasons, respondents respectfully request that leave be granted to file the supplemental brief which is appended hereto.

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No. 94-1471

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On Writ Of Certiorari To The United States
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SUPPLEMENTAL BRIEF OF RESPONDENTS

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ARGUMENT

SECTION 502(l) OF ERISA CONFIRMS THAT PARTICIPANTS AND BENEFICIARIES HAVE A RIGHT OF INDIVIDUAL RECOVERY UNDER § 502(a)(3) FOR BREACH OF FIDUCIARY DUTY

Section 502(l) of ERISA, 29 U.S.C. § 1132(l) (Supp. 1993),¹ provides in relevant part as follows:

Civil penalties on violations by fiduciaries

(1) In the case of -

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary

* * *

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) -

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the

¹ Section 502(l) was enacted as part of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 2101, 103 Stat. 123.

Secretary under subsection (a)(2) or (a)(5) of this section.

The reference in § 502(l)(2)(B) to amounts ordered to be paid "to a plan or its participants and beneficiaries" establishes that recovery for breach of fiduciary duty is available not only on behalf of a plan but also on behalf of individual participants and beneficiaries in an action brought by the Secretary of Labor. The statute indicates that such recovery may be obtained in an action by the Secretary under either § 502(a)(2) or § 502(a)(5). However, given the Court's interpretation of § 502(a)(2) in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the statutory reference to recovery on behalf of participants and beneficiaries must be read as relating to actions under § 502(a)(5).

The relevant language of § 502(a)(5) is identical to that of § 502(a)(3), except that the former authorizes actions by the Secretary, while the latter authorizes actions by a participant, beneficiary or fiduciary. Both sections authorize actions "to enjoin any act or practice which violates any provision of this subchapter . . . or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this subchapter. . . ." Subchapter 1 of ERISA includes § 404, which defines the obligations of an ERISA fiduciary.

The Court has stated that language used in § 502(a)(3) should be deemed to have the same meaning as the same language used in § 502(a)(5). *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2070 (1993). The language of § 502(l) confirms two critical facts about

§ 502(a)(5), and therefore also about § 502(a)(3). First, it confirms that an action to redress a breach of fiduciary duty may be brought under §§ 502(a)(5) and (a)(3). Second, it confirms that in such an action, recovery may be obtained on behalf of individual participants and beneficiaries.

It is important to note that the manner in which § 502(l) is relevant to the construction of § 502(a)(3) in this case is quite different than the manner in which the petitioner in *Mertens* sought to make use of § 502(l). In *Mertens*, the petitioner argued that § 502(l)'s reference to an "applicable recovery amount" demonstrated that money damages must be available in an action under § 502(a)(5), and therefore also in an action under § 502(a)(3). The *Mertens* Court noted, however, that an award of restitution (a traditional equitable remedy) would provide an "applicable recovery amount" for the purpose of § 502(l), so that it was not necessary to construe the statute as establishing the existence of a damages remedy. *Mertens*, 113 S. Ct. at 2071. The first question presented in this case is not whether damages are available in an action under § 502(a)(3), but whether participants and beneficiaries have a right of individual recovery for breach of fiduciary duty under ERISA. The feature of § 502(l) which speaks forcefully to that issue was not raised or addressed in *Mertens*. For that matter, although § 502(l) has been in effect since 1989, the statute's bearing on the question presented in this case apparently has never been addressed in any of the cases decided on either side of the question presented here. The language of § 502(l) nevertheless represents another clear and direct indication – in addition to the plain language

of § 502(a)(3) - of Congressional intent that participants and beneficiaries have a right of individual recovery for breach of fiduciary duty under ERISA.

CONCLUSION

For the reasons set forth above and in respondents' original brief, the decision of the court of appeals should be affirmed in its entirety.

Respectfully submitted,

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